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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY and SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS,

versus

GREENWOOD COUNTY and E. L. BROOKS, S. A. AGNEW and E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, and HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, RESPONDENTS.

BRIEF FOR RESPONDENTS, GREENWOOD COUNTY AND ITS FINANCE BOARD

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BRIEF FOR RESPONDENTS, GREENWOOD COUNTY AND ITS FINANCE BOARD

OPINIONS OF THE COURTS BELOW

The opinions of the Courts below which have been officially reported are as follows:

Opinion of the District Court on motion to dismiss, 10 Fed. Supp., 854 (R. 117, April 23, 1935).

Opinion of the District Court on the merits, 12 Fed. Supp., 70 (R. 477, August 10, 1935).

Order of Circuit Court of Appeals remanding cause to District Court, 79 Fed. (2d), 995 (R. 515, Dec. 5, 1935).

Opinion of Circuit Court of Appeals on the merits, 81 Fed. (2d), 986 (Feb. 22, 1936).

Order of this Court remanding the cause, without opinion on the merits, 81 L. Ed., 149 (R. 539, Dec. 14, 1936).

Opinion of the District Court upon rehearing of the cause, 19 Fed. Supp., 932 (R. 744, May 26, 1937).

Opinion of the Circuit Court of Appeals, 91 F. (2d), 665 (R. 848, August 6, 1937).

STATEMENT OF CASE

This bill in equity was instituted in the District Court of the United States for the Western District of South Carolina on November 7, 1934, against Greenwood County and the members of its finance board (R. 2). Harold L. Ickes, as Federal Emergency Administrator of Public Works intervened and was made a party defendant on December 4, 1934 (R. 65).

The defendants' motion to dismiss the bill was overruled by the District Court (R. 117) and the matter was referred to a Special Master to take testimony (R. 152). The Court, after the testimony taken had been reported to it (R. 157), granted the injunction prayed for (R. 484). From this order the defendants appealed to the United States Circuit Court of Appeals for the Fourth Circuit, but because of the fact that during the pendency of the appeal the Administrator and the County had entered into a superseding Loan and Grant Agreement, the Circuit Court of Appeals, upon motion of the Administrator, remanded the cause to the District Court (R. 515).

The District Court, after admitting additional testimony, refused by its order dated December 21, 1935, to vacate the injunction order (R. 518-527). Upon appeal by

the defendants, the Circuit Court of Appeals reversed the injunction orders of the District Court and ordered the bill dismissed (81 Fed. (2d), 986).

Certiorari was granted by this Court on the petition of Duke Power Company (298 U. S., 651), but, after a hearing had been had, this Court, without expressing an opinion on the merits, reversed the order of the Circuit Court of Appeals and remanded the cause to the District Court with directions to vacate the injunction orders of August 26, 1935, and of December 21, 1935, and to retry the case (R. 540, 81 L. Ed., 149).

The District Court, after vacating the injunction orders (R. 541) and granting a temporary restraining order (R. 550), heard the case on its merits, and by its final decree (R. 799) denied the relief prayed for by petitioners and dismissed the petitioners' bill on the merits, filing its opinion (R. 744) and findings of fact and conclusions of law (R. 779).

From the decree of the District Court the petitioners appealed to the Circuit Court of Appeals. A cross appeal was prosecuted by the defendants from that portion of the decree directing that one-half of the costs be taxed against the defendants.

The Circuit Court of Appeals, by its decree dated August 6, 1937 (R. 878) affirmed the decree of the District Court except in so far as it taxed one-half of the costs against the defendants, and as to this the District Court's decree was reversed.

The petition for certiorari was granted by this Court October 25, 1937.

DISCUSSION OF FACTS

Petitioners' case has always seemed to us to rest necessarily upon the correctness of their assumption that the evidence completely establishes certain ultimate conclusions of fact favorable to them. Their arguments on the fundamental legal questions involved all lead from one or more of these assumed factual conclusions, are all based wholly upon these conclusions and are all unavailing if these conclusions are incorrect. We submit that the Record, especially in view of the two opinions below, clearly shows these assumptions of fact to be erroneous and the further use by petitioners of such disproved conclusions as premises in the various portions of their argument to be unwarranted.

The District Court has made complete Findings of Fact covering all of the factual matters at issue between the parties in this litigation and as to which evidence was adduced. We could not in any attempted summary hope to produce a more concise or coherent picture of the factual background than that continued in the District Court's Findings as they appear on pages 779-790 of the record.

The Circuit Court of Appeals, after examining all the testimony and exhibits in the light of petitioners' assignments of error accepted these findings as correct and in confirming them made independent references, at least in connection with the more important, to those portions of the Record which established them. This concurrence of the two lower Courts on the questions of fact raised concludes those questions since this Court has definitely announced the rule that if does not grant certiorari to review evidence and discuss specific facts. *U. S. v. Johnston,* 268 U. S., 220; *Southern Power Company v. North Carolina Public Service Commission,* 263 U. S., 508.

The rule is so well settled that where the findings of fact by a District Court are concurred in by the Circuit

Court of Appeals they will not be reviewed by this Court and will be accepted unless clear error is shown that we cite only a few of the more recent cases:

Page v. Arkansas Natural Gas Corp., 286 U. S., 269.

Texas & N. O. R. Co. v. Brotherhood of Ry. Clerks, 281 U. S., 548.

U. S. v. Commercial Credit Co., 286 U. S., 63.

In view of this rule, of the explicitness of the findings by the two lower Courts and of the abundant support for these findings in the Record, we think we are clearly justified in taking the position that the Findings of Fact by the District Court, at least insofar as they are specifically concurred in by the Circuit Court of Appeals, may now be regarded as the facts of the case. However, since petitioners have sought so consistently throughout the litigation to establish certain allegations as facts and have based their case so completely on the assumption that they are facts, it is advisable for us to separately consider the more significant of these findings to show how fully they are established by the record.

Purpose of the Administrator

Petitioners' contention, which has assumed more and more importance as the litigation has proceeded and other positions have been weakened, is that the Administrator made this loan and grant for the purpose of reducing petitioners' rates, so doing because of an established policy on his part to use PWA money to reduce power rates throughout the country. There is no evidence whatever establishing the immediate purpose attributed by petitioners to Mr. Ickes and the testimony as to his general policy falls far short of proving even the existence of such a policy. The two Courts below have held that just the contrary has been proved and have found as a fact (R.

788, 856) that the Administrator in making the loan and grant to Greenwood County had no purpose of lowering petitioners' rates; his policy and that of the Public Works Administration being correctly set out in the Administrator's Report to the U. S. Senate (73rd Congress, second session, Senate document 167; defendants' Exhibit 70):

> The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry.

The finding as to the general policy of the Public Works Administration is justified by evidence throughout the record. Mr. Ickes testified on the stand in Spartanburg that he had no intention of exercising any control or influence over the rates to be charged by Greenwood County (R. 642); that he had no interest in the rates of the county's competitors save as an investor in revenue bonds of the county (R. 643); that the statement contained in defendants' Exhibit 70, Senate Document 169, is a correct statement of the policy of the Public Works Administration (R. 645); that in connection with the application of Greenwood County he took into account no considerations other than those general ones to which he had referred (R. 646); that neither he nor the Public Works Administration had any intention of engaging in the operation, directly or indirectly, of the Greenwood County project (R. 651); and that he would have made the loan and grant to Greenwood County regardless of the rates of the Duke Power Company, or his opinion of the rates, if Greenwood County had legal authority to enter into the contract and could satisfy the Public Works Administration that it could liquidate the loan (R. 667).

No purpose on the part of any representative of the Public Works Administration other than that declared in

the Act was disclosed or evidenced to any of the representatives of Greenwood County. Mr. Emmett I. Davis, secretary of the Greenwood Finance Board, testified (R. 688): "I know of no instance either in correspondence or in interviews where the Public Works Administration, or any of its employees or agents, have said or indicated that the direct or implied object of this loan and grant was or is for the purpose of forcing down Duke Power Company rates." To the same effect is his testimony on page 689 of the record; the testimony of Mr. Barksdale (R. 668); of Mr. Duncan (R. 696), and of Mr. Sweeney (R. 698).

Examination by PWA of Duke's Rates

The fact that the Public Works Administration examined Duke's rates before approving the application of Greenwood County does not mean that they had any design to force down those rates. As to this the District Court made a separate finding (Finding XIX, R. 788) approved by the Circuit Court (R. 856) pointing out that, since the bonds offered by Greenwood County for the loan were revenue bonds depending for their security upon revenues of the project, the Public Works Administration had to satisfy itself that the county could meet the rates of the private utility operating in the territory and thus be assured of the reasonable security required by Congress under Title II of the National Industrial Recovery Act, Section 203 (a), (Appendix to Government's Brief, p. 4).

On the original hearing Mr. A. C. Bruce, of the Federal Power Commission, pointed out the necessity of examining the Duke Power Company's rates (R. 294); as did also Mr. C. E. Rose (R. 300, 307).

Mr. Ickes stated under oath that his interest was that of any bond holder, saying (R. 643):

> I have no interest in the rates of the County's competitors because of our investment in the County's

> plant. The fact that the rates of the plaintiffs were high or low might indirectly affect the security of the County's bonds. If the plaintiffs reduced their rates below the cost of producing and supplying current and the County had to meet these rates in order to hold its customers, it would have indirectly an effect. Other than that which I have just indicated, neither I nor the United States Government has any interest in the plaintiffs' rates.

Mr. Ickes states (R. 667), that he would have made the loan and grant to Greenwood County regardless of the petitioners' rates if he were otherwise satisfied of the legality and security of the loan. On cross examination he repeated, with perhaps even more emphasis, that his only interest in the rates of either the County or the petitioners was the interest of a prospective bond holder (R. 665).

Dr. Clark Foreman, the head of the Power Division of the Public Works Administration, thus states (R. 671) the consideration that is given to rates when revenue bonds are offered:

> If the project is a competitive project, that is to say, if it would be competitive with the existing private utility were it built, then we would have to assure ourselves that the rates of the project would be sufficiently low to secure business and sufficiently high to pay out the bonds which we would lend on. • • • We do not give consideration to the rates of the proposed municipal plant or of the existing private utility for any other purpose than that of reasonable security.

Mr. D. T. Duncan, County Engineer, who designed the rate schedule, was moved by the same consideration. He states in his testimony that he realized the County had to have rates under which they could sell power, and that they must undersell the steam plants operating in the territory and the Duke Power Company in order to get customers (R. 695).

Petitioners' Evidence as to Purpose of Administrator

In contradiction of these definite and authoritative statements as to the true policy of the Public Works Administration petitioners have only offered certain PWA press releases, excerpts from Mr. Ickes' book, "Back to Work," remarks made on cross examination at the original hearing by an engineering witness, C. E. Rose, and the testimony of the witnesses Vennard, Byerley, Carter and Post at the last hearing before the District Court. The excerpts from the press releases and from the Administrator's book lose the meaning attributed to them by petitioners when replaced in their original context and the manner and purpose of their publication is considered. The remarks of the witness Rose, a PWA subordinate qualified to speak only as to engineering matters, are equally unreliable as evidence of the real policy of the Administrator. All of these—press releases, book and testimony of subordinate—were covered by Mr. Ickes when he was on the stand and he flatly contradicted the implications drawn by petitioners from them (R. 648-51, 666-70).

There remains to be considered then, in this connection, only the effect of the evidence offered by plaintiffs at the final hearing before the District Court. The testimony of the witnesses Post (R. 577), Vennard (R. 590), Byerley (R. 606), and Carter (R. 610) and Plaintiffs' Exhibits 50 to 74 (R. 595-602, 608, 611-14, 619-26, 702) were offered for the sole purpose of establishing the existence of a "power policy" in the Public Works Administration—a policy to procure, in addition to the results anticipated by the statute, a reduction in private utility rates. All of this evidence concerned activities of members of the Electric Power Board of Review, a board which at one time existed in the Public Works Administration for the purpose of reviewing applications for the financing of electric power plants and of making recommendations in connection with

such applications to the Administrator. The individual members of the Electric Power Board of Review, according to petitioners' argument, went beyond this advisory capacity and in handling applications used their power for the purpose of causing private utilities to lower their rates, thus evidencing the existence of a fixed purpose on the part of the Public Works Administration to reduce utility rates.

We shall argue below that the testimony adduced for this purpose should not have been admitted in evidence; but we say also that, even if it be considered competent, it is entitled to little weight as against the clear statements by the Administrator to Congress and to the Court as to his purposes and policy. The substance of this testimony can be stated as follows: When a utility learned that a municipality at the time being served by it had applied to the Public Works Administration for a loan or grant with which to erect its own generating or distribution system, the Public Relations Counsel of that utility went to Washington and conferred there with a member of the Electric Power Board of Review, either Mr. Henry T. Hunt or Mr. Otto Rau, in regard to the city's application; sometimes filing a formal protest, sometimes handling the matter informally. In the discussion the question of utility rates came up; whether raised by the utility representative or by the Public Works representative is not clear from the testimony. In some cases the utility proposed that they would reduce their rates and the municipality would withdraw its application. When such a proposal was made it was usually referred, as the exhibits will show, to the municipality, and at times it was suggested to the municipality that it consider the question of withdrawing its application.

Negotiations of this character were testified to in regard to numerous municipal applications, but in no instance did the petitioners offer testimony as to what was the

eventual outcome of the applications. After this testimony was in, Dr. Clark Foreman, the head of the Power Division, which is the board now charged with duties similar to those of the old Electric Power Board of Review, attempted, over petitioners' objection, to state the final disposition of the applications referred to in petitioners' testimony. In all cases which it was possible to trace to a conclusion it developed that the question of lowering utility rates was not the determining factor in granting or refusing the loan, except insofar as the rates affected the security (R. 673-76). Regardless, therefore, of what discussions took place between Mr. Hunt and Mr. Rau and the representatives of the utility companies, none of these discussions had any effect in determining whether the allotment would be granted or not.

Although some of these applications had to do with general obligation bonds rather than revenue bonds, the Public Works Administration would even in those cases have some legitimate interest in prevailing rates. The 1930 census figures, of which this Court will take judicial notice, show that the municipalities whose applications were referred to by petitioners' witnesses were almost all very small in population and there was the likelihood to be considered that the revenue from the proposed plant would be the only source from which the municipality could obtain funds to pay the debt. Under a situation of this sort a cautious investor would have a very real interest in assuring himself before purchasing general revenue bonds of a small municipality that the power plant to be constructed with the proceeds of the bonds could meet local competition so as to be operated at a profit and actually provide the municipality with sufficient funds to retire its bond issue.

Another equally important reason for the ineffectiveness of this line of testimony is that it is wholly concerned with the activities of one small board and the actual au-

thority of that board was definitely and indisputably limited in scope.* The board was created by an order of the Administrator dated May 9, 1934 (Plaintiffs' Exhibit 46, R. 574). This order gave to the Electric Power Board of Review only the right to recommend; it reserved to Mr. Ickes the sole power of making allotments. When it came to the Administrator's attention that the board was exceeding this authority, he wrote a memorandum to Mr. Hunt (Defendants' Exhibit 79, R. 714), admonishing the board to confine its powers "to what I originally intended them to be, namely, the review of power projects and the making of reports and recommendations to me for my decision." The board was dissolved by an order of the Administrator, March 16, 1935 (Defendants' Exhibit 78, R. 713).

Parenthetically, it occurs to us that regardless of the purpose of the members of the board in carrying on negotiations with power companies as to their rates, the effect of what they did was to provide the Public Works Administration with information extremely valuable in its legitimate determination of whether there existed in each application the reasonable security demanded by the Statute. The result of the negotiations was a definite ascertainment of the extent to which the existing utility was willing to reduce its rates. Having before it the lowest possible figure at which the private utility was willing to operate, the Public Works Administration not only knew that if the proposed municipal project could approximate those rates when constructed it could sell power and be self-liquidating, but was also assured that after construction the municipal plant would not be subjected to ruinous competition.

Furthermore, this whole line of testimony has no material effect in this case because there is no evidence at

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* In fact, as we shall point out below in discussing the admissibility of the evidence, the petitioners' testimony does not even purport to show any illegal *action* by the Electric Power Board of Review *as a board*. It refers only to statements and representations made by the individuals who composed the Board.

all that the Electric Power Board of Review or anyone else connected with the Public Works Administration negotiated with petitioners as to their rates or made any effort at all to force down their rates. Had there been any correspondence between the Public Works Administration and Duke Power Company suggesting that the Power Company reduce its rates, or conversations to that effect, certainly the petitioners would have offered the correspondence or testimony as to the conversations in Court.

As a matter of fact, if an examination is made of the testimony introduced by the Duke Power Company in July, 1934, before the Board of Review in protesting on the Greenwood County application (Defendants' Exhibit 57), it will clearly be seen that no such discussion had been had with the Duke Power Company. This exhibit, which is being sent up with the Record, is a very interesting commentary on the liberality of the Public Works Administration in permitting a protestant to go into all forms of protest which it desired. It will be seen that the board permitted counsel for Duke Power Company to introduce evidence relating to the charities of the Duke Endowment because the Duke Endowment happened to own stock in the Duke Power Company, something that was far afield in the matter under discussion. It permitted Duke Power Company to produce engineering testimony in which they attempted to persuade the Public Works Administration that the project was not financially sound. It permitted Duke Power Company to offer testimony of textile executives protesting against the Greenwood plant upon the ground that it might permit lower power rates to certain textile mills in Greenwood County which were not served by the Duke Power Company.

Finally, it is our position that even if this testimony does tend to show the existence of a purpose on the part of the Electric Power Board of Review to reduce private utility

rates and this purpose be attributable to the Administrator, still at the time of the execution of the present contract between the Public Works Administration and Greenwood County on November 30, 1935, the Electric Power Board of Review had been dissolved for ten months, its actions repudiated by the Administrator and its policies abandoned. At that time the Power Division had been established and its policy in making recommendations is clearly set out in the testimony of Dr. Clark Foreman, its director (R. 670-72). Dr. Foreman stated that no consideration is given to the rates of a proposed municipal plant or of the existing private utility "for any purpose other than that of reasonable security." He stated that since he has been director of the power division he frequently discussed matters of policy with the Administrator and that there has been no change in policy since his appointment (R. 673).

The holding is implicit in both opinions below that the fact that an extraneous power policy once existed and motivated the actions of some of the boards or departments of the Public Works Administration cannot affect our case if that policy had been abandoned. The Courts below in interpreting the testimony as to the policy of the Public Works Administration from the time of its inception to the present adopted the view that at one time an emphasis had been placed upon the social desirability of lowering power rates but that such policy was abandoned. We do not agree with the lower Courts in this interpretation of the evidence, but we do rely upon their conclusion that, even accepting as a fact the existence at one time in the handling of applications by the Public Works Administration of a policy apart from the purposes of Title II and the purposes announced by the Administrator in his Report to the Senate, the existence of that erstwhile policy does not affect the policy now existing or invalidate acts done under that proper

policy. The petitioners have no vested right in an administrative error.

County's Control of Plant and Rates

It seems to us that any purpose to force down petitioners' rates by subsidizing competition with petitioners by the County would on its face be futile unless the Administrator had the power to control the rates of the County. Both Courts below have found that no such right to control the rates exists (R. 783, 854). Paragraphs 12 and 13 of the contract of November 30, 1935 (R. 501), could not more definitely evidence the intention of the parties that after the plant is constructed all matters of operation, including the right to fix rates, will be under the control of the County. The only rights which the contract gives the Administrator as to rates for service are those rights which a holder of revenue bonds would have regardless of contract under the Constitution and laws of South Carolina.

It might be well at this point to discuss briefly the changes made in the contract of December 8, 1934, by the contract of November 30, 1935, and the reasons for those changes. The 1934 contract contained a provision requiring the borrower to have adopted a resolution as to rates satisfactory to the Administrator before the Government should be under any obligation to make the loan. This provision was intended by the parties to the contract to apply only to the initial rates (R. 650) and we believe by its terms had only such application. However, this provision was construed by the District Court on the original motion to dismiss (R. 122, 480) as giving to the Administrator continuing control over the rates. Thus construed the provision violated the South Carolina Revenue Bond Act (Appendix to Government's Brief, p. 56), which required the municipality to reserve the right to alter the rates in order to properly service the bonded debt. Because of the respect which respondents had for the District Court's construction

of this provision, a new contract was drawn with a view to clarifying the language so that by no possible interpretation could it be said to violate the State Act.

It was also thought advisable to change the contract in another respect. The contract of December 8, 1934, contained certain provisions as to labor which were construed in the case of *Arkansas-Missouri Power Company v. City of Kennett, Mo.*, 78 F. (2d), 911, as giving to the Administrator the right to impose new labor conditions after construction had been started. The Court of Appeals in the *Kennett case* held that this constituted an illegal delegation of the municipality's right to control municipal construction. This point was never raised in our case, but, when the opinion in the *Kennett case* was called to Mr. Ickes' attention, he decided to submit new contracts to the various municipalities eliminating these labor provisions as well as the provisions found by the District Court in our case to be objectionable to State law (R. 643-45).

Petitioners' brief makes the point that since Greenwood County's rates, which were adopted prior to the change of the contract (November 30, 1935), were readopted by the County after the new contract, there is no substantial difference between the two contracts, and the further point that the date of the original allotment, July, 1934, is the determining date on the question of legality of the project. Petitioners' counsel, however, fail to point out that the rates proposed for the Greenwood County project were designed by the County's engineers prior to the time the application was made to PWA, and have never been changed since that time. This fact was thoroughly established by the District Judge's sixth Finding of Fact (R. 781-782), to which no error was assigned when the petitioners appealed to the Circuit Court of Appeals. It is clear, therefore, that Greenwood's rates were not a result of any conference between the Administrator and the County.

PWA Funds Used for Power Projects Insignificant

Another fact which disproves the existence of any effort by the Administrator to use the funds appropriated to the Public Works Administration to carry out a policy of reducing private utility rates is that only a very small proportion of the funds available to him for the construction of public works has been used to promote competitive power projects. Both of the lower Courts were impressed by the unimportance of this field of PWA activity in comparison with the work done by it in other fields (R. 786, 856). They both stressed the fact that as of January 1, 1937, there were 9,389 non-Federal projects of the Public Works Administration of which only 282 were power projects and only 92 of these 282 involved competition with existing private companies. The total amount involved in these 92 so-called competitive projects was only $27,339,947 as compared with $1,480,612,543 involved in the 9,389 non-Federal projects. This is less than 1% of th total number of allotments and .98% of the total amount of allotments. The Courts below quite logically adopted the view that it does not seem reasonable to say that Mr. Ickes acted as Administrator with the primary purpose of causing competition to private utilities and yet used so sparingly his broad powers and the vast funds available to him to carry out that purpose.

No Solicitation of Application by PWA

The factual position taken in petitioners' argument that the Public Works Administration solicited or instigated Greenwood County's application for the loan and grant so that competition would be given the petitioners and their rates forced down is without support in the record, the evidence being definitely to the contrary and amply supporting the concurrent findings by the two lower Courts (R. 784, 853) that the determination to engage in the genera-

tion and distribution of electric power was made by the properly constituted authorities of Greenwood County of their own free will and that there was no solicitation nor coercion on the part of the Public Works Administration or any of its representatives.

Plaintiffs' Exhibit 38 (R. 368-370) shows that the Special Board for Public Works approved Greenwood County's application and made an allotment on June 20, 1934; that it was approved by the President on June 27, 1934, and that after reconsideration had been given to the allotment by reason of the protest of the Duke Power Company (defendants' Exhibit 50, R. 463, defendants' Exhibit 57), the allotment was reaffirmed by the Board and the President on November 7th and 8th, 1934 (R. 368-69), and was included in a list signed by the President on the latter date (R. 370).

The uncontradicted testimony of Mr. D. T. Duncan, Chief Engineer for the County (R. 267-274), shows that the rates for the proposed Greenwood County project were designed by him upon his own calculations of the costs, financing and possible market for the project. These rates set up prior to the application of the County to the Public Works Administration are the same rates which the County now expects to charge. They were fixed by resolution of the County Board passed pursuant to the South Carolina Revenue Bond Act (R. 20-33). They were reaffirmed in the rate resolution of December 2, 1935 (defendants' Exhibit 73), adopted immediately after the executing of the existing loan and grant agreement of November 30, 1935.

Mr. Davis states (R. 687):

> Neither the Public Works Administration of the Federal Government or any other branch or representative of the Federal Government, so far as I know, solicited or suggested the filing of this application. Greenwood County has taken the initiative in filing the application, pressing the Public Works Administra-

tion for an allotment and in litigation involving the case.

He further states (R. 689):

> I have not received at any time from anyone connected with the Public Works Administration a suggestion that Greenwood County withdraw its application in exchange for a lowering of rates in territory served by the Duke Power Company.

Mr. Duncan said this (R. 693):

> The original rates fixed in the application were fixed by me and by my engineering staff without any advice or suggestions from anyone connected with the Public Works Administration. In going over these matters again at the request of the Finance Board my engineering staff has acted independently of the Public Works Administration and recommended these figures to the Board without consultation with the Public Works Administration engineering staff. • • • No one connected with the Public Works Administration or any other branch of the Federal Government solicited this application from me, or, as far as I know, from any member of the Board. Greenwood County filed the application and has pressed it with the Public Works Administration as vigorously as possible. • • • At all times the County has been the body pressing for this allotment. It has not been solicited in any fashion, as far as I know, by the Public Works Administration.

Secretary Ickes states unequivocally (R. 646):

> In no instance did I solicit specific applications. The applications came voluntarily from the community that wanted the public works projects, accompanied by engineering and legal data. Sometimes it was incomplete and we had to send it back for additional information, but it was always initiated by the local community.

Specifically as to the Greenwood County application the Administrator said (R. 646):

> Neither I, nor the Public Works Administration, nor the United States Government, initiated or insti-

gated or induced the making of applications for competitive power projects. We did not in the particular case of Greenwood County.

The period of time elapsing between the filing of the County's application and the approval of the project in itself sufficiently refutes the idea that the Administrator had urged or was hastening the construction of a plant to compete with the petitioners. The application was made on November 16, 1933, and was not approved until eight months thereafter, on July 19, 1934 (R. 267, 368, 370, 695). Because of protests by the Duke Power Company which the Public Works Administration scrupulously gave ear to (R. 181, 363), no contract was entered into until December 8, 1934 (R. 513, 521), a period of another six months. During all this time Greenwood County was the party that was pressing for action (R. 687).

As denying the existence of petitioners' contended for "power policy" in the Public Works Administration, these simple facts stand on a par with the previously discussed showing of how comparatively little of the appropriations for public works went to competitive power projects.

County's Rates No Yardstick

All of the facts discussed above, of course, go to refute petitioners' broad position that the Administrator in making the loan and grant was acting in furtherance of his policy to bring about a reduction of private utility rates. Petitioners, however, make the further contention that regardless of the existence or non-existence of this policy the *effect* of this loan and grant will be to set up a yardstick for the fixing of private utility rates and for this reason alone must be considered illegal. We shall have more to say as to the legal aspects of this argument below, but it is enough to point out at this time that the District Court found as a fact that the rates charged by the Greenwood County project could not be used as a yardstick for rates

charged by electrical utilities in South Carolina. There is, the Court said (Finding XX, R. 789), no logical comparison possible between the factors necessarily used by the two plants in rate computation. The District Court's finding as to this is clearly sound and was held by the Circuit Court to be amply supported by the testimony (R. 858). The Greenwood County plant would clearly have two competitive advantages: (1) the fact that a portion of its construction cost came as a grant from the Federal Government and (2) at least partial exemption from taxation. The private utility on the other hand would also have two advantages: (1) the fact that in a large system the overhead cost per K.W.H. would be substantially less than in the small municipal plant and (2) freedom from the labor and material provisions in the PWA contract and resulting reduction in construction cost.

Petitioners' witnesses agree that there would be no usable yardstick, Mr. Reed stating (R. 565) that a comparison of the rates of the Greenwood County project with the rates of Duke Power Company would be fallacious; as does also Mr. Marshall (R. 179, 184).

Damage to Petitioners

Another Finding of Fact by the District Court that we should like to comment upon briefly is that concerned with the alleged necessity that petitioners reduce their rates throughout their entire system to meet the competition in Greenwood County. That finding (XXI, R. 789) is another of those specifically approved by the Circuit Court of Appeals (R. 858) and is as follows:

> The testimony shows that at the most the Greenwood County plant will produce about 25,000,000 K.W.H. Of this amount the County has tentative plans to sell about 12,000,000 K.W.H. to parties who are now customers of Duke Power Company. Duke Power Company, in the Piedmont Section of the Carolinas in 1936

sold 2,476,000,000 K.W.H. The increase over their 1935 sales was over 380,000,000 K.W.H. Thus the loss of 12,000,000 K.W.H. to Greenwood County will amount to only about 3% of the annual increase of the Duke Power Company. From a practical standpoint, it is inconceivable that this small competition would result, under all of the evidence in this case, in a forced reduction throughout the entire Duke system.

In any event, the Duke Company in appearing before the South Carolina regulatory body with respect to its rates could show these pertinent facts in a very definite manner. We do not conclude that the competition of the Greenwood County plant would necessarily force the Duke Company to lower its rates throughout the system.

The evidence substantiates the finding that the loss by Duke Power Company to the Greenwood County project will not result in a general reduction of Duke Power Company's rates. Plaintiffs' Exhibit 18 (R. 340) lists the customers of the Duke Power Company with whom Greenwood County has made contracts and shows that Greenwood County will sell to such present customers of Duke only about 12,000,000 K.W.H. annually. It is not the County's intention to confine its sales of electricity to customers of the petitioners, Mr. Davis saying (R. 687):

> Greenwood County has not heretofore and does not intend to confine its efforts to selling power to Duke Power Company customers alone. Greenwood County hopes to sell the major part of its primary current output to municipalities, rural sections and small industries in Greenwood, Newberry and Laurens Counties and surplus primary and secondary to large industrial users. The undeveloped rural load in the three counties plus the developed industrial load in Greenwood County, not now sold by Duke Power Company, is sufficient to liquidate loan at proposed rates.

Mr. Duncan's testimony is to the same effect (R. 694).

Mr. Davis states (R. 690) that Greenwood County will not have generating capacity sufficient to take on many

more large industrial customers and that it will be only a comparatively short time before the municipal and rural areas will begin to absorb the entire output of the plant. He testifies that since the preparation of plaintiffs' Exhibit 18, the County had obtained some prospective contracts with one of Mr. Abney's mills, which is not now served by Duke.

The field of customers unsold by Duke Power Company is ample for the Greenwood project to sell all of its power. Mr. Davis states (R. 313-314) that Duke furnishes only 8% to 10% of the power used in Greenwood County.

In 1934 a cotton mill owner at Clinton, S. C., built a steam plant and began to furnish power to former customers of Duke (R. 313; defendants' Exhibit 45, R. 430). The loss of these customers, the City of Clinton, Clinton Cotton Mills, Lydia Cotton Mills and Panola Cotton Mills, is admitted by petitioners' witnesses, Marshall (R. 181), and Reed (R. 563). The amount lost to these customers was about the same amount of business as the Greenwood County project will take from Duke (Reed's testimony, R. 563). Despite these losses, Duke Power Company is continuing to do business and has not had to reduce its rates (R. 564).

Duke's sales in 1936 were the highest in the history of the system (Reed, R. 563; Nabow, R. 629; defendants' Exhibits 90 and 91, R. 734), being an increase over 1935 sales of approximately 380,000,000 K.W.H., or sixteen times Greenwood County's maximum annual production of 25,000,000 K.W.H. (R. 565).

In the opinion of the County's witnesses, Chapman, Duncan, and Sweeney, the construction of the Buzzard Roost project and the sale by Greenwood County of all its available power will not materially affect the Duke Power Company system (R. 668, 696, 698).

This opinion is substantiated by petitioners' witness Reed, who admitted that the proposed Buzzard Roost plant,

because of its small size, could not materially damage the Duke Power Company in dollars and cents (R. 565).

We have not in this rather disjointed treatment of the facts as established by the Courts below gone into all of the factual elements of the case, but have confined ourselves to the Findings most strongly contested by petitioners and which they must overcome before they can hope to succeed in this appeal. We believe that we have demonstrated from the Record how inevitable those findings are.

SUMMARY OF ARGUMENT

Since Greenwood County has full constitutional and statutory authority to operate its plant in competition with the Duke Power Company, the latter has no standing in Court to investigate the source from which the County obtains the funds to build the plant, and therefore the legality of the Administrator's action in making the loan and grant does not present a justiciable controversy in this Court.

The Congress of the United States, under the provisions of the General Welfare Clause, had a right to allocate funds to the several States, and their subdivisions, to be used by them in a comprehensive program of public works in order to relieve national unemployment.

Title II of the Recovery Act in delegating to the President the powers to select individual projects to be included in the comprehensive program under the standards and classifications set out in the Act did not violate the constitutional prohibition against the exercise of legislative power by the executive.

The Congress having directed the President, through the Administrator of Public Works, to include in the comprehensive program projects for the development of water power and for the transmission of electrical energy, the Administrator and the President complied with the Act when they allocated funds to Greenwood County for the

construction of a hydro-electric plant on the Saluda River and for transmission lines to convey this electrical energy.

Any incidental non-national effect which the Recovery Act may have or which this particular project may have, does not render the allocation of these funds illegal.

ARGUMENT

I

Petitioners have no Standing to Attack the Validity of the Loan and Grant Agreement

Both of the courts below, apart from their decisions in favor of defendants on the constitutional questions involved, held that the determination of those questions was not necessary, petitioners having no standing in court to question the expenditure of federal funds, either upon the ground that Title II of the National Industrial Recovery Act is unconstitutional or upon the ground that the statute has not been complied with. This holding is in accord with that of every appellate court to which the question has been presented.*

It is elementary that before a party is entitled to ask for any relief under our system of jurisprudence he must show that he has a legal right that has been invaded or is threatened with invasion by the acts of which he complains. This Court has had occasion during the present term to reaffirm this rule. In *Ex Parte Albert Levitt*, 82 L. Ed. 1, the *per curiam* order contains the following language:

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a *direct injury* as the result of

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* The decisions of other Circuit Courts of Appeal are: *Alabama Power Co. v. Ickes* (App. D. C.), 91 Fed. (2d), 303; *Arkansas-Missouri Power Company v. City of Kennett* (C. C. A., 8th), 78 Fed. (2d), 911; *Allegan v. Consumers' Power Company* (C. C. A., 6th), 71 Fed. (2d), 477.

that action and it is not sufficient that he has merely a general interest common to all members of the public. *Tyler v. Judges of Court of Registration,* 179 U. S., 405, 406, 45 L. Ed., 252, 253, 21 S. Ct., 206; *Southern R. Co. v. King,* 217 U. S., 524; *Newman v. United States,* 238 U. S., 537, 549, 550, 59 L. Ed., 1446, 1451, 1452, 35 S. Ct., 881; *Fairchild v. Hughes,* 258 U. S., 126, 129, 66 L. Ed., 499, 504, 42 S. Ct., 274; *Massachusetts v. Mellon,* 262 U. S., 447, 488, 67 L. Ed., 1078, 1085, 43 S. Ct., 597. (Italics supplied.)

We submit that the petitioners have not shown a direct injury or invasion of a legal right by any act or combination of acts on the part of the defendants. What they are really complaining of is the creation of a situation containing potential damage to their business—a situation made up of two separate elements, (1) the undertaking by Greenwood County to engage in competition with them in the manufacture and sale of electric power, and (2) the financing of this competition by the Public Works Administration through a loan and grant to the County. If neither the first element nor the second, nor a combination of the two constitutes an invasion of petitioners' legal rights they clearly have no standing in Court.

We do not believe that petitioners any longer seriously question the legal right of Greenwood County to engage in competition with them. The County was given full power by the Legislature of South Carolina (XXXVIII S. C. Statutes 411, 1392, 1543; Appendix to Government's Brief, pp. 46, 65) to build and operate a hydro-electric plant at Buzzard Roost on the Saluda River; to sell the power in the three counties of Greenwood, Newberry and Laurens; to receive a gift of money from the United States; to borrow money for the construction of this project and to issue revenue bonds as security for the loan. The decision of the South Carolina Supreme Court in *Park v. Greenwood County,* 174 S. C., 35, 176 S. E., 870, fully settled all questions of constitutional and statutory power under state law.

The right of Greenwood County to build its plant and sell its power is not made less absolute by the fact that in doing so it will compete with the petitioners. This Court has held, in every case that has come before it involving an attempt by a holder of a non-exclusive franchise (such as petitioners have here) to avoid competition by a state or its political subdivision, that property rights in a public utility plant or in a franchise did not include the right to be free from competition, but that competition even by the sovereignty giving the franchise was a risk which was accepted by the private utility when it entered the field. *Puget Sound Power and Light Co. v. City of Seattle,* 291 U. S., 618; *Madera Waterworks v. Madera,* 228 U. S., 454; *City of Joplin v. Southwest Missouri Light Co.,* 191 U. S., 150.

Given this undeniable right of the County to engage in competition with petitioners and taking it to be equally as well settled that an unauthorized expenditure of federal funds by the Administrator in itself gives petitioners no right to complain (*Mass. v. Mellon,* 262 U. S., 447), it only remains to consider petitioners' contention that the combination of the County's competition and the Administrator's expenditure of federal funds constitutes a legal injury and gives them a standing in Court. This contention is based upon the premise that petitioners' position as public utilities with franchises from the State gives the right to be free from illegal competition and that competition aided by an unauthorized expenditure of federal funds by a federal officer is illegal. It is true that this Court has in the case of *Frost v. Corporation Commission,* 278 U. S., 515, announced the rule that the holder of even a non-exclusive franchise has the right to enjoy the use of that franchise free from illegal competition and may appeal to the Courts for protection when such competition threatens. The fallacy in petitioners' attempted use of this principle lies in the fact that the rule is properly and necessarily limited to cases where the competition itself is illegal, *i.e.*, where it is

in violation of valid laws of the particular state that has granted the franchise and prescribed the rights and duties attaching to it. When the state has specifically said through its Legislature and its highest Court, as South Carolina has done in our case, that the competition is lawful, the doctrine of *Frost v. Corporation Commission* and similar cases has no application.

Damages directly resulting from lawful competition are *damnum absque injuria,* even though that competition is caused or made possible by the unlawful conduct of a third person; *Railroad Company v. Ellerman,* 105 U. S., 166; *Chicago Junction Case,* 264 U. S., 258; *Sprunt & Son v. U. S.,* 281 U. S., 249.* The fact that the third party whose illegal act aided the lawful competition happened to be a public officer does not alter the principle upon which the decisions are based. To have any relief in the courts against the actions of such an official it must first of all be shown that his actions, disregarding their official nature, inflicted a legal injury on the plaintiff. It would only be after that determination that his official capacity would have any bearing on the situation.

The damage suffered by Duke Power Company would be the same regardless of where the money to build the County's plant came from. Let us suppose that instead of being a cabinet officer making this loan and grant, as petitioners charge, in violation of the statute and Constitution, the lender were an embezzler and making the loan and grant from federal funds which he had embezzled. Under those circumstances petitioners' legal injury—an injury suffered in common with all other citizens because of the illegal use of federal funds—could not be added to the damage resulting from the legal competition of the County so as to give rise to a cause of action. Petitioners' injury from the Administrator's acts in the case at bar is of exactly the same

* Since the Government's Brief will undoubtedly contain a detailed analysis of these important cases, we shall not attempt any discussion of them.

nature as in the case imagined. Neither in itself gives petitioners standing to sue and neither makes out a cause of action when combined with damage from legal competition.

Petitioners cite such cases as *Hitchman Coal and Coke Company v. Mitchell,* 245 U. S., 229; *Truax v. Raich,* 239 U. S., 33; *Hammer v. Dagenhart,* 247 U. S., 251; and *Pierce v. Society of Sisters,* 268 U. S., 510, as authority for the granting of injunctive relief against the Administrator if it can be shown that his illegal acts made possible the damage to the petitioners even though the immediate cause of that damage was the admittedly legal act of the County. An examination of these cases will show that in all of them the third party against whose illegal acts relief was granted was inducing the consummation of the damaging transaction by fraud or intimidation with the direct and sole purpose of causing damage to the petitioners. The touchstone of every decision in this line of cases is the element of malicious intent manifesting itself in a scheme or conspiracy to cause directly the very damage complained of. No such element of malice can possibly be found in the facts presented here. Even admitting that the evidence establishes all that the petitioners ask of it—that the Federal Government in making loans and grants has been motivated by a purpose of reducing private utility rates throughout the country—that objective is far different in the eyes of the law from malicious intent to do harm to the petitioners.

The District Court, while completely adopting in its Conclusion of Law No. 7 the view that petitioners cannot assert a cause of action based upon damages resulting from lawful competition, such damages being *damnum absque injuria,* held that petitioners would have a right to relief if they could show a regulation of their intra-state affairs by any agency other than the State of South Carolina regardless of whether such regulation resulted in damage to them or not. We do not agree with this theory of the District Court that a Court of Equity can allow injunctive

relief without a showing of substantial damages, either suffered or immediately impending; but we submit that when the Court adopted this view and still did not grant petitioners the relief they prayed, it gave an importance to its finding that there would in fact be no regulation of petitioners' rates by the Federal Government that such finding could not otherwise have had. Petitioners were put in the position of being able to sustain their case by showing merely that the situation would result in some type of regulation by the Federal Government. This they failed to do. By assuming a legal position as favorable as possible to petitioners upon their right to sue, the District Court threw open the doors to the merits of petitioners' case. It allowed them to go fully into the alleged Federal regulation and then with all the evidence before it and looking only for proof that Federal regulation, even if harmless, might result, the Court found as a fact that petitioners and their rates would not be subjected to any form of Federal regulation by this loan and grant to Greenwood County (R. 764, 870).

The Circuit Court of Appeals refused to follow this theory of the District Court as to the right to sue and reiterated its former holding that the bill should have been dismissed for lack of equity, adopting the simple and unassailable reasoning that (1) the county violates no legal right of the petitioners by competing with them; (2) the Administrator violates no legal right of petitioners in making loans and grants of public funds; and (3) there is no principle "upon which action which violates no right may be enjoined because in aid of another action which violates no right" (R. 870).

II.

The Enactment of Title II of the National Industrial Recovery Act is Within the Powers of Congress Under the General Welfare Clause

Since this litigation began, what was perhaps the most important constitutional question originally presented was definitely settled by this Court when it held in the case of *United States v. Butler,* 297 U. S., 1, that the power of the National Congress to make appropriations under the General Welfare Clause is not confined to those matters as to which Congress is given the right under the Constitution to legislate. After this putting to rest of a nation-old controversy, the only questions as to the power of Congress to enact Title II of the National Industrial Recovery Act which remained open were whether the relief of unemployment was in fact for the general welfare and whether a program of public works construction was a proper method for the relief of unemployment.

The first of these questions, at least, was settled during the last term of this Court in the Social Security decisions; *Steward Machine Co. v. Davis,* 57 S. Ct., 883, *Helvering v. Davis,* 57 S. Ct., 904, where it was held that the raising and spending of funds for the relief of unemployment and for benefits to the aged were proper exercises of the power of Congress to levy taxes and make expenditures to promote the general welfare. In the *Steward case,* the Court said:

> During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The

problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States v. Butler,* 297 U. S., 1, 65, 66, 56 S. Ct., 312, 319, 80 L. Ed., 477, 102 A. L. R., 914; *Helvering v. Davis,* 300 U. S., .., 57 S. Ct., 904, 81 L. Ed., .., decided herewith. The nation responded to the call of the distressed. Between January 1, 1933, and July 1, 1936, the states (according to statistics submitted by the government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938 the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,-681,000,000.

Equally forceful language is found in the *Helvering case* where it is particularly pointed out that the discretion necessarily existing in the determination of what appropriations are for the general welfare as distinguished from local welfare is a discretion belonging to Congress and before an exercise of Congress' spending power can be found by the Court to be unconstitutional there must be a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.

It is interesting to note that the District Court rested the constitutionality of Title II of the Recovery Act, at least in part, upon a power broader and more fundamental than that usually considered to be granted by the General Welfare Clause, holding (R. 764-67) that appropriation of

monies by the Federal Government to subdivisions of states for the construction of public works is justified by the power, inherent in the very nature of our dual form of government, of one sovereignty to aid another. It is certainly true that this Court in the Social Security cases upheld the right of Federal and State Governments to deal with each other as sovereigns in coping with problems common to both which neither could effectually meet alone, and whether or not it was intended to state this power as one distinct from that given to the Federal Government by the General Welfare Clause, the decisions have added immeasurably to our concept of the sovereignty of both Federal and State Government.

There remains, then, only the question as to whether, admitting the power of Congress under the General Welfare Clause to relieve nation-wide unemployment, appropriations for the construction of public works throughout the nation is a proper form for such relief to take. The idea of a program of public works as a means of alleviating unemployment is, of course, not novel, it having been accepted by economists and political philosophers since the days of Pericles as perhaps the most practical method of giving work to those who need it and obtaining at the same time something of lasting value to all. Congress, realizing, as other Congresses and other Administrations had done before, that such a program would increase employment not only in the actual construction of the project but in all industries connected with the production and transportation of materials, seized upon this historic method as being as appropriate a weapon against unemployment as was available to it. The results have justified Congress' hope. Defendants' Exhibit 76, a Department of Labor pamphlet entitled "Employment Created by PWA Construction", which is being sent up with the Record, contains findings by the Bureau of Labor Statistics that the activity of the Public Works Administration had resulted by August, 1936,

in the employment of approximately 6,475 man-months of labor. It is stated as a conservative estimate that for each person put to work at the site of the projects 2½ additional persons were given employment away from the site.

Petitioners' position as to the unconstitutionality of Congress' authorizing the construction of public works for the relief of unemployment comes simply to saying that since each separate project is local in its nature, the program cannot be for the general welfare. In Title II of the National Industrial Recovery Act Congress did not attempt to make appropriation for any individual project, the appropriation being instead for "a *comprehensive program* of public works." The construction of individual projects might be, when taken by themselves, of only local benefit but the program as a whole is for the benefit of the nation. The relief of unemployment, to have any national effect must necessarily be accomplished in unconnected localities by putting unconnected individuals back to work.

Petitioners seem to argue further that the program of public works authorized by the Act is not for the general welfare because the uses of the various projects after construction will be for the benefit of the localities where they are situated. The purpose of Congress in providing for a comprehensive program of public works is fulfilled in the *construction* of the projects so as to provide for an increase in employment. The *use after construction* was not within the purview of the Act and the fact that incidental local benefits will result through the use of the projects cannot affect the fundamental fact that Federal aid in their construction is part of a comprehensive national program of public works appropriately designed to promote the general welfare.*

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* In saying that Congress, being primarily engaged in relieving unemployment, was not interested in the local benefits to be derived from the use of the public works, we are not implying a belief that a consideration of such local incidental benefits or a manifest desire for them by Congress would make the Act any the less constitutional. The greatest

There is no justification for petitioners' argument that Title II is beyond the powers of Congress because power plants which might compete with those of private industry are included in the list of projects eligible for loans and grants. The determination of the type of project desired was naturally left by Congress to the applicant. Whether or not a competitive power plant was desirable was a question of policy for the state government to decide. Greenwood County wanted such a plant and the Legislature of South Carolina has determined that it is proper for the county to have and operate such a plant. We do not believe that Congress would have been justified in saying to us that we could not have a power plant because of possible competition with private utilities and that since we did not need or desire any other type of project we could have no part at all in the public works program.

In the list of eligible projects contained in Title II, no emphasis is given to competitive power plants or any other type of competitive projects. Certainly it cannot be said that a simple refusal by Congress to exclude power projects from this list makes the Act unconstitutional.

III.

The Aid Given by the Federal Government to Greenwood County is Within the Powers of Congress Under the Commerce Clause

Although our fundamental position is that Congress has validly authorized the making of this loan and grant under the General Welfare Clause of the Constitution and the Courts below have passed only upon this power, we believe that this particular loan and grant has, in addition,

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advantage of a program of public works over other systems of unemployment relief is the accomplishment of permanent local benefits, and it cannot be said that in order to pass a valid Act Congress had to close its eyes to this advantage. The Federal Government can manifest the cooperation with state sovereignties approved by this Court in the Social Security cases in no more salutary manner than by aiding the states and their sub-divisions in the acquisition of much-needed public works.

constitutional validity under the Commerce Clause as an aid to navigation.

Although the Saluda River at the point where the Buzzard Roost dam will be built is not accessible to water craft from the sea, the flow of the river at this point does affect the navigability of the Congaree-Santee system (R. 400-402).

The Federal Power Commission which has authority to act only upon a showing that the navigability of rivers affects interstate commerce (16 U. S. C. A., 797), has found that the project here does affect interstate commerce (R. 400). The determination by the Federal Power Commission of this question of fact is conclusive.

Morgan v. U. S., 298 U. S., 468.

This Court has frequently confirmed Congress' right to control the flow of water in streams which affect navigation, even though the stream at the point involved is not actually navigable.

U. S. v. Rio Grande Dam & Irrigation Co., 174 U. S., 690.

Egan v. Hart, 165 U. S., 188.

New Jersey v. New York, 283 U. S., 336.

That purposes other than navigation will also be served in the construction of the dam is immaterial.

Arizona v. California, 283 U. S., 423.

IV.

Title II of the National Industrial Recovery Act Does Not Violate the Tenth Amendment

Petitioners argue their contention that Title II infringes upon the reserved rights of the state and violates the Tenth Amendment as a proposition separate and distinct from the fundamental question of Congress' powers under the General Welfare Clause. To us their position that the statute intrudes upon the reserved rights of the

state is simply the converse of their position that no constitutional power exists for the enactment. If a particular power is found to have been delegated by the Constitution to the Federal Government, the Tenth Amendment by its very language has no application. This view seems to us to be supported by the Court's treatment of the constitutional questions in the Social Security cases, particularly *Helvering v. Davis, supra.* This separation of approaches to what should be the same basic inquiry may itself be taken to demonstrate the fallacy inherent in petitioners' argument. Not being able to find any invalidity in what Congress has done by regarding the Act itself with its undeniably legitimate purpose, petitioners find it necessary to go further and argue that unconstitutionality is established because of collateral and indirect effects of the legislation. They are contending that, even if this Court finds ample authority under the Constitution for Congress to have enacted Title II of the National Industrial Recovery Act, that power must be disregarded and considered as non-existent if the Statute can be shown in some aspects of its application to have the effect of regulating matters non-federal in character; *and this although the instances involving alleged regulation are infinitesimal in proportion to other applications of the statute.*

We submit that there is no authority for such position. When the power of Congress to enact a particular law can be pointed out in the Constitution the fact that the incidental effect of the legislation might be beyond the scope of the Government's enumerated powers does not invalidate the law. Petitioners have cited on page 55 of their brief the cases of *Collins v. New Hampshire,* 171 U. S., 30, and *Hammer v. Dagenhart,* 247 U. S., 251, for the rule that the *purpose* of an act of Congress "must be determined by its natural and reasonable effect." They cannot seriously be contending that the natural and reasonable effect of the comprehensive statute we are considering is to regulate

their electric rates in South Carolina. They have never even argued that the underlying purpose of Congress in enacting Title II of the National Industrial Recovery Act was to force them to reduce their rates.

Collateral Effects Cannot Invalidate Statute

We understand the well-settled rule of constitutional interpretation to be that where a statute itself contains no regulatory provisions the Court will not condemn it as violative of the Tenth Amendment even if its collateral effect is the regulation of intrastate activities. This principle has been established in a long line of cases, has never been denied or questioned by any decision of this Court and has been recently re-stated and re-affirmed in the case of *Sonzinsky v. United States,* 300 U. S., 506. The petitioner there contended that the tax imposed by the National Fire Arms Act, the violation of which he was convicted of was not a true tax but a penalty imposed for the purpose of regulating traffic in fire arms, the local regulation of which is reserved to the states under the Tenth Amendment. This Court in a unanimous opinion held that the tax was valid as an exercise of a proper Congressional power and that it could not consider whether it operated as a regulation or was intended by Congress as a regulation of matters beyond the Congress' power.

The Court, in reviewing the authorities, demonstrated that there were two separate lines of decisions necessitating different approaches—one, exemplified by the *Child Labor Tax Cases,* 295 U. S., 20, *Hill v. Wallace,* 259 U. S., 44, and *Carter v. Carter Coal Co.,* 298 U. S., 238, holding that where a statute although purporting to be passed under an admitted federal power such as the taxing power, actually contained provisions regulating or authorizing the regulation of intrastate activity, it must be condemned as violative of the Tenth Amendment; the other, holding that where

a statute comes within proper Congressional power and contains on its face no regulatory provisions, it will not be stricken down even though its collateral and incidental effect will be to accomplish something which Congress has no power under the Constitution to accomplish directly. As examples of the latter line of decisions the Court cites *Veazie Bank v. Fenno,* 8 Wall., 533; *U. S. v. Doremus,* 249 U. S., 86; *McCray v. U. S.,* 195 U. S., 27; *Smith v. Kansas City Title Co.,* 255 U. S., 180; *Arizona v. California,* 283 U. S., 423; *Hampton & Co. v. U. S.,* 276 U. S., 394.

In some of these cases, notably *Hampton & Co. v. U. S.,* and *Smith v. Kansas City Title Co.,* it will be found that the rule was applied, although Congress had declared in the Act that it had a desire for the collateral result.

The case of *U. S. v. Butler,* 297 U. S., 1, relied on almost exclusively by the petitioners in their argument as to violation of the Tenth Amendment, when examined is found to be of that class of cases dealing with statutes which themselves contain explicit provisions authorizing the regulation of intrastate activities. The Court, in the *Butler case,* held that the tax resisted was an incident of a statutory plan for regulating agricultural production, which statutory plan invaded the reserved rights of the states. The Agricultural Adjustment Act showed a direct purpose on the part of Congress to regulate, the plan for the regulation and control of intrastate activities appearing clearly throughout the statute.

On the other hand, in Title II of the National Industrial Recovery Act there is no provision at all regulating or authorizing the regulation of intrastate rates. There is no indication in the Act that Congress desired or even anticipated that regulation of intrastate rates would result. If such regulation does in fact occur, it will be a collateral or incidental result of the operation of the statute so as to come within the rule applied in the *Sonzinsky case* rather than within the rule applied in the *Butler case.*

It is clear that Congress in enacting Title II had no purpose to regulate petitioners' rates, nor, we submit, was there present even a purpose to cause competition to the petitioners. The competition will be purely an incidental consequence of Congress' primary purpose, the promotion of the general welfare by increased employment. The only way that Congress could have avoided the incidental effect would have been to provide that no loans and grants could be made where competition with private industry might result. This it refused to do, and wisely, because it is clear that such a provision would have almost completely nullified the program. Not only, to avoid competition with private industry, would Congress have had to deny loans and grants for power projects, but other types of projects would have had to be limited. It is difficult to imagine any type of useful project which might not offer competition to an established private enterprise. Public hospitals would compete with private hospitals; public schools with private schools; public swimming pools with private swimming pools; publicly owned bridges with private toll bridges, and so on through the entire list. States and municipalities would have found it difficult, if not impossible, to select projects which they desired and which they were willing to borrow money in order to possess. It seems to us an unwarrantable proposition that the mere fact that Congress *permitted* the making of loans and grants for competitive power projects could invalidate the Congressional Act.

Regulation is Illusory

We have argued that the collateral or incidental effects of the Federal Statute, even if those effects were a regulation of intrastate rates, would not invalidate the statute. It is our position, however, that Title II cannot be said to have even the incidental effect of regulating the petitioners' rates. It is true that the construction of the

Greenwood County project will result in competition to the Duke Power Company although the evidence shows that the competition from this small hydro-electric project will be of no great importance. Such *competition* is, we submit, not *regulation* in any sense and certainly not in the sense of regulation in violation of the Tenth Amendment. The only actual regulation of petitioners' rates possible in South Carolina is regulation by the State. The Federal Government does not have in South Carolina, and cannot have as long as our system of dual sovereignty exists, any system or machinery whereby it could regulate intrastate rates even if it desired to do so. Its rights under the existing loan and grant agreement with the county, as we have demonstrated and as we believe petitioners admit, certainly give it no such right of regulation.

The State of South Carolina has entrusted its power to regulate the petitioners' rates to a state agency, the South Carolina Public Utilities Commission, which has the power to apply any *just* standard that it desires to the petitioners' rates to determine whether or not they are proper. If the yardstick which petitioners claim will be afforded by the rates of Greenwood County is in fact a *just* yardstick, measuring exactly 36 inches, petitioners cannot complain of its application by the Commission. If, however, as the two Courts below have found, the rates of Greenwood County do not constitute a just yardstick on account of the entirely dissimilar nature of the financial and political setup of the two systems, the Public Utilities Commission will not use it. In neither case can plaintiffs be damaged.

Since Commissions and Courts in fixing utility rates take into consideration reproduction cost, and since Greenwood's construction contracts will be public records, it may be that the South Carolina Public Service Commission will obtain from the Greenwood records certain information as to the cost of items which go into electric utility construction. Similar information, however, would be available to

the Public Service Commission whether the plant were built in the United States or in a foreign country, and a private utility cannot complain because the Public Service Commission obtains correct information about construction costs.

We insist that competition is not regulation, but even if we accept petitioners' position that the competition here does amount to regulation, we think it is clear that such regulation will be regulation by the State of South Carolina and its sub-division, Greenwood County. The Federal Government will have absolutely no right to control or regulate the operation of the rates of the Greenwood County plant. Such control and regulation is in Greenwood County, subject to the general powers of the State Legislature. The State, through its sub-division, will be doing only those things which it has always had a right to do and petitioners have no more right now to complain of the doing of those things than they have always had. If, as petitioners contend, the rates of the Greenwood County plant are to be used as a yardstick to apply to their rates, the yardstick will be a State yardstick and one which the State has always had the power to use.

The Statute Involves no Coercion of the Sovereignty of the State

Petitioners' argument is that the State by the acceptance through its subdivision, Greenwood County, of Federal funds for the financing of the proposed project has been coerced into giving up matters properly within its exclusive control. Authority for this position is sought from the case of *United States v. Butler, supra,* where this Court held as violative of the Tenth Amendment "a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." The difference between the coercion found to exist in the *Butler case* and the elements of our case alleged by plaintiffs to show co-

ercion are obvious. Under the Agricultural Adjustment Act the Federal Government was found to be giving money to private persons for the purpose of controlling matters properly under state control. This was being done without the consent of the state and very possibly in direct opposition to state policy. The Administrator's actions in our case do not in any sense restrict the powers of the state but only furnish to the state means of exercising a power that has always existed. It cannot be said that the state's power is encroached upon by the giving or accepting of financial aid in the furtherance of a declared state policy.

The State did not accept the loan and grant under any compulsion or coercion. It knew that federal monies for the construction of public works were available to it if it could satisfy certain conditions, but it was purely a matter of choice for the state, or its subdivision as to whether it would avail itself of a loan and grant from these funds for construction of a public works project. It was also a matter of choice for the state as to what type of project it desired.

We of the County submit, and the evidence in this connection is uncontradicted, that it was Greenwood County's desire for a hydro-electric plant, uninspired by any federal agency, that led to the application and that it was Greenwood County's perseverance that led to the allotment. Our volition has never been swayed or attempted to be swayed by any word or act of a federal employee.

Furthermore, neither Greenwood County nor the State of South Carolina has given up anything as a result of Title II or as a result of the Administrator's acts. The control of rates remains in the sovereignty of the State of South Carolina where it has always been. This control goes not only to the rates of Duke Power Company, but also to the rates of the municipal plant. That the South Carolina Legislature can control County government and all matters

connected therewith throughout the state is a doctrine well preserved by our South Carolina Courts.

Park v. Greenwood County, 174 S. C., 35, 176 S. E., 870.

Heslep v. State Highway Department, 171 S. C., 186, 171 S. E., 913.

Duke Power Company v. Bell, 156 S. C., 299, 152 S. E., 865.

Although at the present time rates charged by governmental subdivisions maintaining public utilities are not controlled by the Public Service Commission of the state, there is nothing in our State Constitution or in any of the decisions of our highest Court indicating that the Legislature cannot put such rates within the jurisdiction of the Public Service Commission or supervise them in any manner it sees fit.

1 *McQuillin, Municipal Corporations,* 642, Sec. 251.
27 *R. C. L.,* 1442, Sec. 59.

There was presented to us no choice of yielding or suffering ruin as was found by this Court in the *Butler* decision to have been offered to the farmers under the Agricultural Adjustment Act. The language of Mr. Justice Sutherland in *Massachusetts v. Mellon,* 262 U. S., 482, is applicable in this connection:

> Nor does the statute require the states to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield that purpose may be effectively frustrated by the simple expedient of not yielding.

Even more to the point is the opinion of this Court in the recent case of *Steward Machine Company v. Davis, supra,* where the argument that the sovereignty of individual states was being relinquished in exchange for benefits offered by federal statute was capable of a much stronger presentation than it is in the case at bar. Under Title IX of the Social Security Act the states were in effect given their

choice of creating a state unemployment compensation fund or seeing all of the tax imposed by the federal statute go to the federal fund. In our case the decision by the state not to apply for a federal loan and grant would involve no disadvantage other than not possessing the completed plant, with the accompanying financial obligations. In other words, South Carolina under Title II of the National Industrial Recovery Act had the choice of getting something which they did not have or of keeping what they had. The states under Title IX of the Social Security Act were given the far more urgent choice of getting something or of giving up something which they had.

The Circuit Court of Appeals thus discusses the effect of the *Steward case* upon the Tenth Amendment argument presented by the petitioners here (R. 861):

> Likewise, our conclusion that the statute cannot be condemned as an invasion of the reserved powers of the states is fortified by the decision in *Steward Mach. Co. v. Davis, supra,* wherein the Court said that before a statute could be condemned on this ground there must be a showing that the things which it authorizes are "weapons of coercion, destroying or impairing the autonomy of the states." 57 S. Ct., 890. The carrying out of the program of public works authorized by the statute for the relief of unemployment cannot possibly have this effect; and, specifically, the making of loans and grants to municipal corporations to enable them to engage in enterprises which the states have authorized them to engage in cannot, in any use of language, be said to abridge or invade the powers of the states. As we said in our former opinion, "It is an entirely different thing from giving or lending money to private persons for the purpose of defeating a state policy or regulating matters under state control." Any effect which such loans and grants may have upon rates will be incidental to the competition engendered by the construction of the projects; and where the state itself authorizes the projects and the procuring of the loans and grants for their construction, as did South Caro-

lina in this case (*Park v. Greenwood County, supra*), and retains the right of regulating the rates through the exercise of state power, it cannot be contended with any show of reason that the power of the state is encroached upon by the making of the loans and grants or by the competition resulting from the construction of the projects which they make possible.

V.

There is in Title II no Unlawful Delegation of Legislative Power to the Executive

The authority conferred by Title II of the National Industrial Recovery Act upon the President and the Administrator of Public Works is not such delegation of legislative power to a branch of the executive as was condemned by this Court in the case of *Panama Refining Co. v. Ryan,* 293 U. S., 388, and *Schecter Bros. v. U. S.,* 295 U. S., 495.

The standard laid down in the *Panama Refining Company case,* following the established precedents of *Hampton v. U. S.,* 276 U. S., 395, and *Field v. Clark,* 143 U. S., 649, may be found in the following language:

> Accordingly we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President, in the exercise of the authority to enact the prohibition.

In the statute contested here the policy of the Congress to provide a comprehensive program of public works for the relief of unemployment could be no more clearly stated. In Sections 202 and 203 we find ample standards to guide the President in making his allocations. Various classes of eligible projects are enumerated and the President and Administrator are required to find in the making of each loan that it will increase employment quickly and that the United States Government will be reasonably secured in it.

That it was necessary for the Congress to place in ad-

ministrative officers certain discretion in the approving of particular projects is obvious. It would have been impossible for Congress in 1933 to determine which of the thousands of applications should be granted, regarding in each case the legal and financial soundness. The rule is well established that the necessities of the case will justify leaving a broad discretion in administrative officers.

Butterfield v. Stranahan, 192 U. S., 470.
Union Bridge Co. v. U. S., 204 U. S., 364.
Monongahela Bridge v. U. S., 216 U. S., 177.

This rule was recognized in both the *Schecter* and the *Panama Refining Company cases.*

The recent decision of *Cincinnati Soap Company v. United States,* 301 U. S., 308, is in itself almost a complete answer to petitioners' argument as to delegation of legislative power. There Congress had provided for the payment to the Philippine Government of the proceeds of a tax levied on the processing of Philippine coconut oil without placing any restrictions upon the use by the Philippine Government of the funds paid over to it. Mr. Justice Sutherland, speaking for the whole Court, said:

> The validity of the act disposing of the tax is also attacked as constituting an unlawful delegation of legislative power. That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat., 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may deter-

mine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States v. Hanson*, 167 Fed., 881, 884-885.

Even if it could be said that the original Recovery Act did not provide sufficiently definite standards for the actions of the Administrator and gave to him legislative power, Congress by subsequent enactments has so adopted the previous administrative interpretation of the Act as to provide adequate standards to guide the Administrator in his future expenditures.

Pursuant to Senate Resolution 190, the Administrator furnished to the Senate a document, Defendants' Exhibit 70, giving an account of his stewardship to date, setting out clearly the policies of the PWA, its organization, the procedure used in handling allotments, the standards applied, and a list showing the approved projects.

Thereafter Congress enacted the Emergency Appropriation Act, Fiscal year 1935 (Appendix to Government's Brief, p. 24), authorizing expenditures of $500,000,000.00 for public works under Title II. On April 8, 1935, Congress enacted the Emergency Relief Appropriation Act of 1935 (Appendix to Government's Brief, p. 26), which continued the existence of the Public Works Administration and authorized the continuance of its functions. On June 22, 1936, Congress passed the First Deficiency Appropriation Act, Fiscal year 1936 (Appendix to Government's Brief, p. 37), by which the Public Works Administration was authorized to spend $300,000,000.00 for the making of loans and grants "of the kind and character for which the Federal Emergency Administration of Public Works has heretofore made loans and grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935."

This continuation by the Congress of the functions of the Public Works Administration, with the facts as to what

the Administration was doing fully before it, amounts to complete ratification of the acts of the Administrator and the adoption by Congress as proper of the standards and procedure used by the Administrator.

It is to be noted that the 1936 statute particularly ratified the Greenwood County project.

For legal authority as to the effect of these subsequent ratifications and adoption by Congress of what has been done by the executive, it is necessary only to cite the two recent cases of *Isbrandsten-Moller Co. v. U. S.*, 300 U. S., 139, and *Swayne & Hoyt, etc., Co. v. U. S.*, 81 L. Ed., 400.

VI.

In Making the Loan and Grant to Greenwood County the Administrator is Not Violating the Statute

Petitioners' argument as to the alleged violation of the statute by the Administrator stresses only slightly the contention which actually should be the whole of their argument as to the Administrator's actions; *i. e.*, that Title II of the National Industrial Recovery Act does not *authorize* the making of loans and grants to aid in the construction of electric plants which will compete with private enterprise.

Title II does clearly authorize the making of the loan and grant here contested. The construction of hydro-electric projects is clearly included within the enumeration of the items that by Section 202 of the Act make up the comprehensive program. The legislative history of the Act discloses that Congress intended to include within the program projects of the type here involved (77 Congressional Record, 5053; Appendix to Government's Brief, pages 78 *et seq.*).

The Administrative interpretation of the Act and the fact that within the program was included numerous hydro-electric projects in territories where private utilities were serving was brought to the notice of Congress by Reports

of the Administrator (Defendants' Exhibits 70, 71, 72, 73 and 74). With this knowledge, Congress made further appropriations for and continued the functioning of the Public Works Administration in three consecutive years, as we pointed out under V above.

In enacting the Emergency Relief Appropriation Act of 1935, Congress rejected a proposal to limit public works projects to those which would be non-competitive with private enterprises (Appendix to Government's Brief, p. 78).

In the First Deficiency Appropriation Act, Fiscal year 1936, Congress made special provision to insure that municipal power projects involved in litigation would not be defeated by a lapse of time (Appendix to Government's Brief, p. 38).

It is undeniable then that the Administrator is acting within the express authority of the statute when he makes a loan and grant for the construction of a municipal power plant. What petitioners say, however, is that regardless of the clear authority under the statute for the Administrator to do just what he has done here, if he has made this loan and grant looking to a reduction of petitioners' rates, the loan and grant is invalid. Although they admit that the *effect* of the loan and grant is what will accomplish their alleged regulation and that this effect would ordinarily follow the making of the loan and grant regardless of the purposes or policies behind its making, they take the position that if the reduction of private utility rates is desired by the Administrator, is planned by him, is a part of his broad policy or is used as a criterion in passing on applications, that in itself makes his action illegal.

This contention that an improper motive or desire accompanied the doing by the Administrator of an authorized act so as to invalidate the act was met by the Circuit Court of Appeals on three separate grounds. The Court said:

There are several answers to this, each of which seems to us to be complete and final.

In the first place, the Court below has found, and the finding is supported by evidence, that the Administrator was not actuated by such motive in making the loan and grant to the County. * * * (R. 866).

* * *

In the second place, the Administrator in selecting projects to which loans and grants are to be made under the statute must necessarily exercise an administrative discretion, so as to extend aid to projects which are financially sound and the construction of which will be in the public interest. If, in exercising this discretion, he adopts the policy of not making loans and grants for municipal projects which will not provide rates to the public lower than competing private enterprises, such policy would seem to accord both with sound finance and with the requirements of justice to existing enterprises (R. 866).

* * *

In the third place, even if the Administrator had the motive attributed to him by plaintiffs, and even if this be an improper motive, the validity of his action is not affected thereby (R. 867).

Since we have gone rather fully under our *Discussion of Facts,* above, into the evidence supporting the District Court's finding that the Administrator in making the loan and grant to Greenwood County had no purpose other than that of relieving unemployment through the construction of useful public works, we do not consider any further discussion of the facts establishing this to be necessary. We do not believe that all the testimony brought forward by the petitioners to show that the Administrator is using his office for the accomplishment of his personal desire to reduce utility rates can even tend to refute the combination of two simple and uncontradicted facts: (1) that the allotment to Greenwood County was obtained only after vigorous and persistent efforts by the County, and (2) that

of the entire number of Public Works projects approved by the Administrator only 98/100 of 1% have been competitive power projects.

We further believe that the Circuit Court of Appeals' second answer to the petitioners' argument as to improper motives is sound, although neither we of the County nor counsel for the government argued this view in the Courts below. We have shown that the Administrator had of necessity very broad discretion in approving applications for public works projects. There were many applications for power projects and not all of them could be approved. If the construction of two projects would equally create employment, if the loans to both would be equally secure, and if the other statutory requirements were met in both cases and the Administrator must still choose between them, he would naturally give the project to the community in which it would do the most good. The determination of which project would be of the greatest and most lasting benefit to the citizens of the community would in most cases rest upon whether the proposed municipal plant would give rates lower than those then being provided by private utilities. As Judge Parker said in his opinion:

> • • • There is nothing in law or common sense which requires the Administrator to ignore such considerations in the exercise of the discretion reposed in him. Congress could certainly have provided that no loans or grants should be made under the Act to a municipal enterprise in cases where an existing private enterprise was furnishing service to the public as cheaply as the municipal enterprise would furnish it; and we see no reason why such criterion may not and should not be adopted by the Administrator. He is not required to select the projects on his program by lot or to close his eyes to the interests of the public or the social desirability of projects among which he must choose. • • •

What petitioners are really saying is that the Administrator would never be justified in making a loan and grant for a publicly owned power plant if any competition with private industry would result. Competition and resulting damage to private business could not be avoided by the Administrator if he were to carry out the Public Works program as it was intended. Conceivably almost any useful project desired by an applicant might result in competition for some industry. For him arbitrarily to have refused allotments where there was danger of competition would have caused the collapse of the Act's administration and thwarted Congress' purposes to relieve unemployment.

Petitioners in that section of their Brief beginning on page 38, give the impression that the Administrator was free under Title II to make up the Comprehensive Program of Public Works of whatever types of projects he saw fit and that it was in the exercise of his own discretion that power plants were included among the projects for which loans and grants were available. This position is unjustified since the Administrator was specifically instructed by the Act to make loans and grants for projects of the type involved here.

Section 203-(a) of Title II (Appendix to Government's Brief, page 4) provides:

> With a view to increasing employment quickly * * * the President is authorized * * * to construct, finance or aid in the construction or financing of any public-works project included in the program prepared pursuant to Section 202 * * *.

Section 202 of Title II (Appendix to Government's Brief, page 3) provides that

> The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: * * * (b) conservation and development of natural resources, including control, utilization and purification of waters, * * * de-

> velopment of water power, transmission of electrical energy and harbor improvement and flood control * * *.

Thus it is obvious that even had the Administrator desired to, he could not have refused to make loans and grants for municipal power projects without violating the statute under which he was acting. The Act required the inclusion of power plants in the public works program, whether the Administrator approved of that inclusion or not, and no act or statement of the Administrator could defeat Congress' desire of having loans and grants made for municipally owned power projects. Petitioners, it seems, would deny this. Their argument actually comes to saying that since the Administrator has indicated a personal approval of municipal power projects, no loan and grant for such a project can be valid, being presumably a furtherance of the Administrator's own desires rather than of the will of Congress. If this theory were true and Mr. Ickes had been an enemy of municipal ownership, he could have completely defeated the clear language of the Act by the simple expedient of announcing publicly that he was in favor of lower rates and proposed to use his power as Administrator to accomplish a lowering of existing rates.

The statute authorized the Administrator to take as security for the loans he was instructed to make either general obligation bonds or revenue bonds. At the time the Recovery Act was passed and the Administrator began to carry out the program, the finances of State governments and their political subdivisions were in precarious condition, most of the governmental units having already reached state constitutional limits on general obligation bonds. Therefore, if the Administrator were to make sufficient loans to carry out the purpose of Congress to increase employment throughout the nation, he had to take revenue bonds which could be financed outside of constitutional debt limitations, and which necessitated the construction of projects which would actually produce revenue. Projects of this

character are much more likely to compete with private enterprise than the ordinary type of projects secured by general obligation bonds. The incidental creation, therefore, of competition is caused not by the Administrator's volition but by the necessities of the case.

We come, finally, to the third position assumed by the Circuit Court, that is, that even if the Administrator has the motive attributed to him by the petitioners, and even if this is an improper motive, the validity of his action is not affected thereby. The existence of an ulterior motive on the part of a public officer cannot invalidate his official acts if those acts are within his proper powers.

Dakota Telephone Co. v. South Dakota, 250 U. S. 163.
Spalding v. Dickinson, 161 U. S. 483.
West v. Hitchcock, 205 U. S. 80.
De Cambra v. Rogers, 189 U. S. 119.
Philadelphia v. Stimson, 223 U. S., 605.

The principle established by these cases has been recently re-affirmed by this Court in the case of *Isbrandtsen-Moller Company v. United States,* 300 U. S. 139. The complainant there charged that an order of the Secretary of Commerce, despite its recitals of legitimate purpose, sprang from illegal motives. The Court in a unanimous opinion said that the case was controlled by "the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it."

Since the first decision of the Circuit Court of Appeals in this case holding that the motive of the Administrator was immaterial and since the opinion in the *Isbrandtsen Case* was handed down, the petitioners have changed the name of the element which they claim can be added to the Administrator's admittedly legal actions so as to make them illegal from "motive" to "criterion". In changing the name, however, they have not changed their argument. What they are now saying, as we understand it, is this:

That although the Loan and Grant Agreement with Greenwood County is on its face legal, it becomes illegal because in passing upon the application an illegal criterion has been used by the Administrator—this criterion being whether or not existing electric rates will be reduced by the making of the loan and grant.

To us there is no real distinction between the meaning of the word "criterion" as now used, and the word "motive" as formerly used by petitioners in their argument. What petitioners object to and what they claim will damage them is the alleged requirement that electric rates be reduced. Whether this requirement is manifested in an illegal criterion or is the result of an illegal motive, it seems to us to come to the same thing. In all of the cases which we have cited holding that where an Act is within the power of an officer it is not rendered illegal by any improper intention on the part of that officer, the Court uses the word "motive". It is inconceivable that the result of any of these decisions would have been changed had the Court substituted the phrase, "the application of an extraneous criterion" for "the existence of an ulterior motive".

Petitioners have themselves conceded that the Administrator's intention is irrelevant by taking the position that, regardless of the use of this alleged criterion or the existence of this alleged motive, the necessary and unavoidable effect of the making of the loan and grant to Greenwood County would be a forcing down of their rates through competition. By their own argument they will suffer exactly the same results, no matter whether those results were intended by the Administrator or not, since competition flows directly from *any* administration of the statute that permits loans and grants for power projects.

In other words, petitioners' argument comes in its final analysis to a contention that the collateral effect of the statute can invalidate it, a complete answer to which

position is found in the *Sonzinsky Case, supra,* and the cases therein cited.

If petitioners' argument is sound that allotments cannot be made where they will result in lower power rates, that entire portion of the Recovery Act which provides for financing projects to develop water power and transmission of electric energy will fail. If the proposed municipal plants must charge higher rates than the competing private utility, no plants will ever be built and this for two reasons: (1) Local communities would not ask for a plant which would result in higher rates than those prevailing in the locality; and (2) loans from the Federal Government would not be reasonably secured because the municipal plants would be unable at higher rates to obtain the business.

VII.

The Petitioners' Evidence, Consisting of the Testimony of Frank T. Post, Edwin Vennard, D. E. Byerley and George Carter and Plaintiffs' Exhibits 50 to 74, was Not Competent Evidence in This Case

The testimony of these witnesses and these Exhibits were received by the District Court at the time of the final hearing but their existence in the Record did not keep either the District Court or the Circuit Court of Appeals from holding that the Administrator was not motivated in making this loan and grant by any purpose or plan unauthorized by the statute. We have, therefore, in our *Discussion of Facts* above, treated this evidence as properly before the Court. However, we do believe it was clearly incompetent and offer the position that it was improperly in the Record as additional grounds to sustain the decisions below.

This evidence consists of the recounting of conversations between representatives of power companies and em-

ployees of the Public Works Administration, and correspondence between the same parties, with reference to applications for loans to municipalities other than Greenwood County. Petitioners offered this evidence for the purpose of showing that the Public Works Administration in considering applications from these municipalities did not grant or refuse allocation of funds on the basis of the standard set up in Title II of the Recovery Act and of the rules made pursuant thereto, but granted or refused the loans upon the basis of whether or not the private utility in that area would reduce its rates.

The most important thing to note is that no testimony showing any connection between the handling of Greenwood County's application and the handling of the application of any of these municipalities was offered. No application from South Carolina was included in the group, which consisted of municipalities in the mid-west, Texas, Idaho, and one in Florida. The defendants objected to all this evidence upon numerous grounds (R. 572), including the ground that it was irrelevant; was not admissible as an admission against interest so far as Greenwood County was concerned; that it was hearsay; that there was no proof of the authority of the person writing the letters and making the statements; that the terms of the contract between Greenwood County and the Public Works Administration are clear and the contract itself required no evidence for explanatory purposes.

A. The testimony is irrelevant to any issue in this case.

The only issue involved in this case to which petitioners could possibly contend this testimony is relevant is as to whether the Administrator in making the loan and grant to Greenwood County violated the terms of Title II of the National Industrial Recovery Act. Their argument, as we understand it, is that the testimony is admissible as proving that the Administrator applied an illegal criterion to all

applications for municipal power plants and therefore as proving that he applied an illegal criterion to the Greenwood County application. In the first place, as we have demonstrated in other portions of this argument, there is no legal distinction between the alleged existence of an extra-statutory criterion used in passing upon applications for power projects and the alleged existence of an ulterior motive in the mind of the Administrator. That an ulterior motive on the part of a public officer in doing an act which he has a legal right to do cannot invalidate that act is settled by the case of *Isbrandtsen-Moller Co. v. U. S., supra,* and authorities referred to therein. The existence of a motive or criterion being immaterial, evidence going only to show such existence is irrelevant.

Petitioners offer this evidence to prove not only the *existence* of an extra-statutory criterion but also the *application* of that criterion in the transactions between the Administrator and Greenwood County. They are saying that the testimony of these witnesses proves the application by the Public Works Administration of the alleged extra-statutory criterion in connection with some loans and grants, and that therefore it is proof of the application of the same criterion in regard to the Greenwood County loan and grant. This they contend although the record clearly shows that no criterion other than that prescribed by the statute was used in the approval of the Greenwood County application.

We think that petitioners' error as to the admissibility of this evidence lies in the fact that they do not realize that what they are trying to get from this evidence is proof of the actual doing of an act; *i. e.*, the applying of a non-statutory criterion. There is a very great difference in the law between proving what intent accompanied an act, admittedly done, by evidence as to the intent in the doing of similar acts, and in showing the commission of the act it-

self by such evidence. The requirements of similarity for the latter are much more exacting.

Dean Wigmore in his standard work on Evidence (2d Ed.), clearly states this proposition, Vol. I, page 617, § 304:

> When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than the mere similarity, which suffices for evidencing intent. The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a pre-existing design, system, plan or scheme, directed forwards to the doing of that act. In the former case (of intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the act charged as a part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.
>
> The element, then, must be not merely a similarity in results, *but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*

The testimony which the petitioners introduced all dealt with conferences and communications between representatives of the Public Works Administration and representatives of power companies which were protesting the making of grants to communities which they seryed. If such conferences or communications had taken place in regard to the Greenwood grant the petitioners must necessarily have been parties thereto. Petitioners have offered no evi-

dence as to negotiations between themselves and the Public Works Administration even resembling the conferences and communications testified to by the representatives of other power companies. This in itself, we submit, shows such an obvious dissimilarity between the handling of the Greenwood County application and the handling of the other applications as to make the testimony inadmissible.

Furthermore, the instances which petitioners cite are too limited in number and unconnected to have probative value even as to the existence of any plan or scheme or use of any criterion in the Public Works Administration, much less as to its exercise in the approval of the Greenwood County application. The testimony deals with negotiations between the Public Works Administration and only four representatives of power companies. The PWA had handled several hundred applications for power projects and a reasonable percentage of these have been approved. Yet with a special sample of a few handpicked cases the petitioners seek to establish a general design or plan of such fixity and purposefulness as to evidence the doing of an act in the Greenwood County case where there is no scintilla of evidence to show that such act was done. Mr. Wigmore on this point says (page 336, § 102):

> The probative value of such a design or plan, for the purpose of admissibility, will depend chiefly on two elements, either of which may be very weak in a given instance—the fixedness or absolute quality of the design, in its subjection to no contingencies or conditions, and the specific direction of it to the act in question, *i. e.*, application not merely to a class of acts indefinitely foreseen, but to the exact deed in question.

We submit that the testimony introduced by the petitioners fails absolutely to meet this test and is therefore inadmissible.

B. The Testimony is Repugnant to the Hearsay Rule

The testimony of the witnesses, Post, Vennard, Byerley and Carter and the exhibits relative thereto were objected to as hearsay but the evidence was admitted by the District Court on the ground that the declarations, letters and telegrams were statements against the interest of the Administrator and therefore were not subject to the operation of the hearsay rule.

Although the rules regarding admissions or statements against interest had their origin as an exception to the hearsay rule, they have become so broad and diversified that they are now usually treated as a part of the substantive law of evidence, particularly where the person making the statement is a party to the suit in which it is sought to be introduced.

The theory is that where a person has made an admission or a statement which is against his interest at that time or against an interest which subsequently develops and is being maintained in court, that admission or statement is admissible, not to impeach his testimony, but to contradict his position. Now, since the statement is made outside of court, not under oath or subject to cross examination, it is obvious that it must either be made by the person against whom it is being introduced, or, if made by his agent, it must be shown independently that it was made while that agent was engaged in some transaction on behalf of his principal and acting within the scope of his express or implied authority. We submit that this had not been done in regard to the testimony introduced by the petitioners.

The evidence objected to involved only transactions with the Electric Power Board of Review, and, unless that Board was acting within the scope of its authority from the Administrator, nothing that it did is admissible against the Administrator. It should be pointed out that this case involves no rights of a third party who has relied to his

detriment upon the declarations or acts of members of the Board. The petitioners here are strangers to the transactions as to which they seek to introduce testimony. The petitioners did not rely on any of the acts or declarations of the members of the Board by which they now seek to bind the Administrator. The petitioners introduce this testimony as to acts and declarations of members of the Board and contend that they are acts and declarations of the Administrator merely to show that the Administrator did certain acts, thought certain thoughts, or had certain policies; and we submit that the petitioners must first show, by evidence other than the declarations of members of the Board, that the Board members were acting within the scope of their actual or implied authority during these transactions. This the petitioners have failed to do, and, from the very nature of the agency, are unable to do.

That the authority of the Electric Power Board of Review was definitely limited to reviewing disapprovals of power applications and making recommendations to the Administrator in regard to applications is clearly established by the order of the Administrator establishing the Board (Plaintiffs' Exhibit 46, R. 574). The order did not give the Board authority, either express or implied, to negotiate with the power companies for the lowering of their rates, or to indicate to the power companies upon what conditions the applications would be approved or disapproved, or to make any declarations or announcements as to the policies of the Administrator. We submit that this testimony as to declarations of the Board members while engaged in unauthorized acts is inadmissible against the Administrator.

In *Northwestern Union Packet Company v. Clough*, 20 Wall., 528, this Court said:

> Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so

far as he had authority to make them, and the authority to make them is not necessarily to be inferred from power to do certain acts.

The petitioners being strangers to the transaction have no standing to put forward the doctrine of apparent authority because, so far as the petitioners are concerned, the Board had no apparent authority while dealing with others and the petitioners cannot claim the position of one who has relied to his detriment upon the declarations and apparent authority of an agent.

Richmond Guano Co. v. Dupont, etc., Co. (C. C. A., 4th), 284 Fed., 803.

Maloney Tank Mfg. Co. v. Mid-Continent Oil Corp. (C. C. A., 10th), 49 F. (2d), 146.

There is complete failure on the part of the petitioners to show any ratification of the acts and declarations of members of the Electric Power Board of Review testified to by petitioners' witnesses. The evidence shows that when the unauthorized acts of the members of the Board came to the Administrator's attention he reprimanded Mr. Hunt, the Chairman of the Board, in writing (Defendants' Exhibit 79, R. 714), and ordered the Board to confine itself to the duties for which it had been established. This, in itself, would refute any argument of ratification, since it shows that as soon as the knowledge which would be necessary for ratification came to the Administrator he expressly refused to ratify their acts. The testimony shows further (R. 713) that the Administrator subsequently abolished the Board because he felt that its members had taken to themselves powers which he had not intended for them to have.

The testimony of the Administrator and others shows that the use of the words, "For the Administrator" did not mean that the Administrator had authorized the writing of the letters to which they were appended. That was merely a form of signature used throughout the office

and appeared on most of the letters written by PWA employees (R. 671).

Another independent consideration which shows the incompetency of the evidence objected to is that the petitioners' witnesses did not testify as to actions of the Board but rather as to statements and representations of the individual members of the Board. They do not testify as to what the Board *did* in regard to the various applications, but as to what Mr. Hunt or Mr. Rau *said* in regard to the applications. It is fundamental that when a Board has been given authority by a superior to act as a Board, it must act in that capacity if it is to exercise the granted authority. No effort was made to introduce any evidence of the action of the Board regarding any of these municipal applications.

VIII.

Procedure Adopted by the District Court After the Remand was Proper.

Petitioners argue that the District Court should have limited the scope of the retrial to such changes in the case as might have intervened since the entry of the original decree. Whether or not the District Court was right in refusing to so limit the hearing before it, depends altogether upon the interpretation of the order of remand made by this Court on December 14, 1936 (81 L. Ed., 149). We believe that the interpretation placed on this order by the District Court was correct but we shall not attempt to argue to this Court the effect of its own order.

It is our position that the record, even eliminating all the evidence taken since the original hearing, establishes our right to prevail against the contentions of the petitioners. However, we do feel it our duty to point out that when petitioners state on page 54 and on pages 87, *et seq.*, of their brief, that the motion, pursuant to which the Circuit Court of Appeals originally remanded the cause to

the District Court, contained allegations untrue in fact, that they are in error.

The December 8, 1934, contract contained a provision (R. 81, 83):

> 23. Conditions Precedent to the Government's Obligations. The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:
>
> • • •
>
> (i) Rate Resolution and Bond Resolution. If the Borrower shall not have adopted a resolution satisfactory in form and substance to the Administrator, providing for rates to be charged for services afforded by the hydro-electric system, and shall not have adopted a resolution satisfactory in form and substance to the Administrator, authorizing the issuance of the Bonds.

The Revenue Bond Act of South Carolina (1933 Acts 299, XXXVIII Stat., 411, 418; Appendix to Government's Brief, page 56) provided:

> 21. Rates for Service.—Rates for services furnished by any such system or combined system shall be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and the principal of all such bonds as and when the same become due and payable, to create a Bond and Interest Redemption Fund therefor, to provide for the payment of the expenses of administration and operation and such expenses for maintenance of the system or combined system necessary to preserve the same in good repair and working order, to build up a reserve for depreciation of the existing system, project or combined system, and to build up a reserve for improvements, betterments and extensions of the existing system, project or combined system, other than those necessary to maintain the same in good repair and working order as hereinbefore in this Section provided. *Such rates shall be fixed and revised from time to time so as to produce these amounts,* and the governing body shall covenant and agree in the ordinance authorizing the issuance of

such bonds, and on the face of each bond *at all times to maintain such rates for services furnished by such system,* project or combined system *as shall be sufficient to provide for the foregoing.* (Italics supplied.)

Judge Watkins, in passing upon this provision of the contract (R. 122) found:

> 7. The rates for the sale of power to be produced by said Buzzard Roost project were fixed by Greenwood County, subject to the approval of the Administrator, under the terms of the loan and grant agreement entered into December 8, 1934, providing that, as a condition of the loan and grant, the County should adopt a resolution satisfactory in form and substance to the Administrator providing for rates to be charged for services afforded by the hydro-electric system.

And again in his opinion of August 10, 1935 (R. 477, 480):

> It (the December 8th contract) also requires the fixing of rates agreeable to the Administrator. Strictly speaking supervision may consist in directing either what shall or shall not be done.

The South Carolina Revenue Bond Act, in the quoted provision, required the issuing municipality to reserve the right to revise rates. In our opinion, and in the opinion of Secretary Ickes (R. 650), the contract of December 8, 1934, in the quoted provision, referred only to the initial rate resolution, and did not violate the terms of the State Act. Judge Watkins' language, however, while not entirely clear, is open to the interpretation (81 F. (2d), 986, 989, R. 874), that he found the language of the contract to mean that the Administrator would have the right to supervise the rates after the original rate resolution. The contract so construed, we submit, would violate the provisions of the South Carolina Act; and while Judge Watkins did not say in express language that it violated the South Carolina Act, his findings certainly support the position taken in the motion for remand (R. 493) as quoted in the opinion of the Supreme Court (81 L. Ed., 150).

The argument is made in the petitioners' Brief (page 54) that Judge Watkins, in passing upon the contract of December 8, 1934, held that it violated Federal, not State, law because Judge Watkins' decision said that all State questions had been settled by *Park v. Greenwood,* 174 S. C., 35. However, the *Park decision* was rendered by the South Carolina Supreme Court on October 31, 1934, and the contract to which reference is made was not entered into until December 8, 1934. The South Carolina Supreme Court could not, therefore, have passed upon the question of whether this contract complied with State law.

CONCLUSION

We submit for the reasons above stated that the decree of the Circuit Court of Appeals should be affirmed and petitioners' bill dismissed.

Respectfully submitted,

W. H. NICHOLSON,
R. F. DAVIS,
JAMES F. DREHER,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and its Finance Board.